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BEFORE THE

# Federal Communications Commission

WASHINGTON, D.C. 20554

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| In the Matter of | ) | |
| Satellite Delivery of Network Signals to Unserved Households for Purposes of the Satellite Home Viewer Act | ) | CS Docket No 98-201<br>RM No. 9335<br>RM No. 9345 |
| Part 73 Definition and Measurement of Signals of Grade B Intensity | ) | |

## COMMENTS OF THE WB TELEVISION NETWORK

THE WB TELEVISION NETWORK

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Date: December 11, 1998

No. of Copies rec'd 0+8
List A B C D E

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## SUMMARY

The Commission's NPRM in this proceeding seeks comment on whether to alter its Grade B signal strength standard in order to increase the number of viewers who are considered "unserved" by television network broadcast stations and thus eligible to receive those stations using a home satellite dish under the 1988 Satellite Home Viewer Act ("SHVA"). The WB Network ("The WB"), the fifth largest and fastest growing television broadcast network, believes that the SHVA does not grant the Commission jurisdiction to alter its Grade B standard for SHVA purposes. Congress defined the term "unserved household" in the SHVA by reference to the Commission's pre-existing Grade B definition, and both the statute and its legislative history indicate that Congress did not intend to give the Commission free reign to alter this definition. On the contrary, Congress sought to balance truly "unserved" viewers' interests in receiving television broadcast signals with the rights of local television stations to contract for exclusive programming.

Even if the statute permits the Commission to liberalize the Grade B standard for SHVA purposes, it would be poor public policy to do so. The SHVA is scheduled to sunset at the end of 1999, and Congress will likely enact legislation amending the SHVA in the coming year. Such legislation will most likely address the royalty rates payable under the SHVA, the creation of a new statutory license to permit "local-into-local" satellite retransmissions and the "unserved household" standard. These issues are best addressed in a political setting that permits competing interests to reach acceptable compromises rather than through piece-meal regulation. Furthermore, broadcasters, cable operators, and many parties rely on the Commission's Grade B standard for a variety of functions, which could be severely disrupted by any change to the standard.

Should the Commission decide to ignore Congressional intent and sound public policy and alter its Grade B standard, the NPRM seeks comment on what effects such action may have on long-standing Congressional and Commission policies of promoting the network/affiliate relationships and localism. The WB believes that the effects upon both the network/affiliate relationship and on localism from any change in the "unserved" household test resulting in more widespread distant station importation by DBS could be devastating. Accordingly, should the Commission liberalize SHVA distant station importation, the Commission should simultaneously provide syndicated programming exclusivity ("syndex") and network programming nonduplication ("non-dup") protection to local television broadcast stations regarding SHVA satellite importation of distant television broadcast stations. Such protections will recognize the long-standing rights of television broadcast stations to contract for exclusive programming within a local area, regardless of whether the affected station is carried by the cable systems or, in this case, the DBS operator, in question. Similarly, under existing FCC syndex and non-dup rules, a station's right to contract for programming exclusivity within a particular area is not dependant on whether the station delivers a Grade B contour to every home in such area.

Congress clearly contemplated the application of such rules to satellite providers when it enacted the SHVA. It made clear that although the compulsory copyright license granted to satellite providers in the SHVA was intended to make delivery of network signals easier, it also wanted to ensure that the exclusivity in broadcast programming contracts would not be compromised. Similarly, over the course of many years, the Commission has repeatedly acted

to uphold the rights of television broadcasters to contract for exclusive programming, stating that such rights are essential to the very survival of local broadcasting.

Although the Commission may be concerned with the development of the DBS industry, it cannot jeopardize broadcast localism by denying local independent stations and network affiliates the opportunity to exert their program exclusivity rights. This is especially true in today's video programming marketplace, where DBS is a burgeoning service that is growing by leaps and bounds, both economically and technically. In contrast, many broadcasters are faced with a steady loss in viewing share and, as a result, advertising revenue. It is in the public interest to ensure that viewers receive local programming from a healthy broadcast industry. Therefore, the Commission should prevent DBS providers from importing distant signals to the exclusion of local broadcast stations by applying syndex and non-dup rules to DBS.

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## COMMENTS OF THE WB TELEVISION NETWORK

The WB Television Network ("The WB"), by its attorneys, hereby submits the following comments in response to the above-captioned Notice of Proposed Rule Making ("NPRM").[1] The WB, a limited partnership whose managing general partner is WB Communications, a division of Time Warner Entertainment Company, L.P., is the fifth and fastest growing broadcast television network in the country.[2] The development of a strong line-up of local broadcast affiliates has been one of the most serious challenges faced by The WB as an emerging television network. Accordingly, The WB's interests will be affected by any action in this proceeding which facilitates additional DBS importation of distant affiliates

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[1]Notice of Proposal Rule Making, CS Docket No. 98-201, RM Nos. 9335 and 9345, FCC 98-302 (rel. Nov. 17, 1998).

[2]The WB was launched on January 11, 1995, with two hours of prime time programming per week, carried by 48 affiliated stations nationwide. The WB is currently broadcasting eleven hours of prime time programming on five nights, and carried by over 90 affiliated but independently owned local broadcast stations.

of the established broadcast networks, thereby jeopardizing the health and viability of local television stations, including affiliates of The WB.

## I. INTRODUCTION

The NPRM seeks comment on how to define, measure and predict the strength of television signals, in order to identify those consumers who are "unserved" by television network broadcast stations and thus eligible to receive those stations using a home satellite dish under the 1988 Satellite Home Viewer Act ("SHVA").[3] The WB submits that the statute does not grant the Commission jurisdiction to alter the Grade B standard. However, to the extent the Commission alters its standard, the NPRM also seeks comment on what, if any, effects the Commission's actions in this proceeding may have on network/affiliate relationships and localism. According to the NPRM,

> We acknowledge and reiterate Congress' decision in the SHVA to protect network-affiliate relationships and to foster localism in broadcasting. If we change the number of viewers predicted to receive a local station, we may substantially affect these policies. As we have noted, localism is central to our policies governing broadcasting and the obligation of broadcasters to serve the public interest. In proposing a new or modified predictive model for purposes of the SHVA, we seek comment on what, if any, effects different predictive

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[3] 17 U.S.C. § 119 (1998).

models will have on these policies, and what, if any, steps we can take to further such policies.[4]

The WB believes that the effects upon both the network/affiliate relationship and on localism from any change in the "unserved" household test resulting in more widespread distant station importation by DBS could be significant. Accordingly, should the Commission ultimately act to facilitate such distant station importation, the Commission should simultaneously provide syndicated programming exclusivity ("syndex") and network programming nonduplication ("non-dup") protection to local television broadcast stations regarding SHVA satellite transmissions of distant television broadcast stations. Otherwise, the network/affiliate relationship,[5] as well as the rights of local stations to contract for the exclusive distribution of programming, the importance of both of which Congress and the Commission have repeatedly invoked, will be severely undermined.

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[4]NPRM at ¶ 36 (footnote omitted).

[5]Whenever the term "network/affiliate relationship" is used herein, it is also intended to cover the relationship between independent stations and the programming producers who supply syndicated programming to them. As the Commission has stated, "network non-duplication rules and syndicated exclusivity rules are designed for the identical purpose." Report and Order in Docket 87-24, 3 FCC Rcd 5299 (1988) at ¶ 153 ("1988 Syndex Report and Order"), *recon. denied in pertinent part*, 4 FCC Rcd 2711 (1989). Warner Bros. and its affiliates are leading producers and distributors of syndicated television programming.

## II. THE COMMISSION CANNOT AND, IN ANY EVENT, SHOULD NOT ATTEMPT TO MODIFY THE SHVA'S "UNSERVED HOUSEHOLD" STANDARD.

In the NPRM, the Commission asks whether it has "the authority to proceed on particular issues in this rulemaking."[6] For example, the Commission asks "whether Congress 'froze' the definition of a signal of Grade B intensity for purposes of the SHVA when it adopted the Act in 1988."[7] The Commission tentatively concludes that Congress did not do so.[8] Similarly, the NPRM asks whether the statute permits "the Commission to promulgate a special definition of Grade B intensity for the exclusive purposes of the SHVA."[9] The WB believes that the Commission has no authority to liberalize the Grade B standard for purposes of the SHVA. Furthermore, assuming arguendo that the Commission has the requisite authority to modify the "unserved household" test by revising the Grade B standard, there are compelling reasons for the Commission not to act at this time.

### A. The SHVA Does Not Give the FCC the Authority to Alter the "Unserved Households" Test by Revising the Grade B Signal Standard.

Congress defined the term "unserved household" in the SHVA by reference to the Commission's pre-existing Grade B definition.[10] Likewise, the Committee Report accompanying this section of the SHVA defines "unserved household" as "a household that

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[6]NPRM at ¶ 20.

[7]Id. at ¶ 20.

[8]Id. at ¶ 20.

[9]Id. at ¶ 22.

[10]17 U.S.C. § 119(d)(10).

with respect to a particular network, (A) cannot receive, through the use of a conventional outdoor antenna, a signal of Grade B intensity (as defined by the FCC, currently in 47 C.F.R. Section 73.683(a) . . . ."[11] Therefore, Congress intended "unserved household" for purposes of the SHVA to be defined by the Commission's Grade B standard that existed at the time of adoption of the SHVA.[12]

Furthermore, the SHVA and its legislative history provide no evidence that Congress intended the Commission to alter the Grade B signal intensity standard for purposes of the SHVA. On the contrary, the legislative history states that "the legislation defines the geographical area within which it is reasonable and appropriate to maintain such exclusivity."[13] Clearly, Congress did not intend for the Commission to change the Grade B standard at will, drastically affecting the number of households that are considered "unserved" for SHVA purposes. Rather, Congress carefully balanced the interests of home satellite dish programming providers and users with the crucial governmental interest of protecting the network/affiliate relationship and localism.[14] Any liberalization of the Grade B standard by the Commission would destroy this delicate balance and run counter to Congressional intent.

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[11]H.R. Rep. No. 887(II), 100th Cong., 2d Sess. 25-26 (1988).

[12]See, e.g., Hassett v. Welch, 303 U.S. 303, 314 (1938) (it is a "well settled canon" that "[w]here one statute adopts the particular provision of another by a specific and descriptive reference to the statute or provisions adopted, . . . [s]uch adoption takes the statute as it exists at the time of the adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent") (quoting Lewis' Sutherland on Stat. Constr. (2d ed.), Vol. II at 787-88.

[13]H.R. Rep. No. 887(I), 100th Cong., 2d Sess. 20 (1988) (emphasis added).

[14]Id. at 8, 14; H.R. Rep. No. 887(II) at 20.

From a practical standpoint, the Commission's current Grade B standard is also well understood, relied upon in many contexts, and relatively easy to test. For example, a noncommercial television broadcast station is deemed a "qualified local noncommercial educational television station," and thus has must-carry rights, as to cable systems whose principal headends are within such station's "Grade B service contour."[15] Likewise, in its rulemaking implementing the ADI modification mechanism of the Cable Television Consumer Protection and Competition Act of 1992, the Commission specifically requested parties to provide evidence that "the station places a Grade B coverage contour over the cable community or is located close to the community in terms of mileage" in order to demonstrate that the station does or does not provide "coverage or other local service to the community."[16] The reliance that broadcasters, cable operators and others have placed on the current Grade B standard in many contexts for years would be drastically upset by altering this standard.

### B. As a Matter of Policy, the Commission Should Not Take Any Action to Revise the SHVA's "Unserved Household" Standard at This Time.

Even if the Commission has the authority to modify the SHVA's unserved household test by revising the Grade B signal standard, the Commission should, as a matter of good public policy, defer any action in this arena pending further guidance from Congress. In this regard, the Commission should take note of the fact that the SHVA is scheduled to sunset at the end of 1999. It can therefore be reasonably assumed with a high degree of certainty that Congress will enact legislation amending the SHVA in the coming year. Such legislation

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[15]47 C.F.R. § 76.55(b)(2).

[16]Report and Order in MM Docket Nos. 92-259 *et al.*, 8 FCC Rcd 2965 (1993) at ¶ 47.

almost certainly will address matters going beyond the sunset, including the royalty rates payable under the SHVA, the creation of a new statutory license to permit "local-into-local" satellite retransmissions and, of course, the unserved household standard.[17] These issues are best addressed comprehensively in a political setting that allows the competing interests to find acceptable compromises rather than through piece-meal regulatory intervention, especially given the SHVA's origins as consensus legislation.

From The WB's perspective, the need for the Commission to "stand down" from SHVA-related issues and allow them to be addressed by Congress is particularly great because of the risk that premature Commission action could disrupt efforts to resolve the "local-into-local" issue. There is widespread agreement that the development and deployment of technologies that allow satellite customers to receive their local broadcast signals as a part of their multichannel service (subject to appropriate must-carry requirements) will best serve the public interest goals of protecting the network/affiliate relationship (and the localism inherent therein) and of promoting direct-to-home satellite service as a competitive alternative to cable television. However, within the satellite industry itself there are different technological models and business plans for providing local-to-local service. Achieving consensus among these interests, as well as between the satellite and broadcast industries generally, is difficult

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[17]The need for legislative action to address the unserved household standard is most clearly demonstrated by the fact that, under current law, even a household that cannot receive a signal of Grade B intensity may not receive satellite retransmissions of network affiliates if the household has been a cable customer within the past ninety days. Any attempt by the Commission to promote DBS service as a competitive alternative to cable by revising the Grade B signal standard will necessarily be of limited utility unless and until Congress repeals or modifies this 90-day waiting period provision.

enough without the Commission prematurely picking winners and losers with respect to integrally-related issue of the scope of the unserved household standard.

## III. SHOULD THE COMMISSION ADOPT A DIFFERENT STANDARD FOR VIEWABILITY, ANY SUCH STANDARD MUST INCLUDE SYNDEX AND NON-DUP REQUIREMENTS FOR SATELLITE CARRIERS TRANSMITTING DISTANT SIGNALS

To the extent that the Commission adopts a different Grade B standard for purposes of the SHVA, it must recognize that Congress intended to preserve the network/affiliate relationship, as well as the rights of television broadcast stations to the exclusive distribution of programming within a local area. Indeed, the Commission itself has repeatedly acted to uphold these policies. Thus, to the extent that the Commission acts to allow more widespread importation of distant broadcast stations, it must simultaneously impose syndex and non-dup protection to avoid undermining the viability of local broadcast stations and the network/affiliate relationship.

### A. In Enacting the SHVA, Congress Intended to Preserve the Sanctity of the Network/Affiliate Relationship and the Exclusivity Rights of Local Stations

The legislative history of the SHVA indicates Congress's recognition of the public interest in protecting the network/affiliate distribution system, and the importance of protecting local stations' rights to bargain for exclusivity against imported distant broadcast signals. Indeed, the stated purpose of that legislation was to "ensure[] that [satellite equipment] owners will have access to copyrighted programming while protecting the existing network/affiliate distribution system to the extent that it is successful in providing programming by other

technologies."[18] Congress specifically emphasized the importance of program exclusivity to the broadcast industry:

> Free local over-the-air television stations continue to play an important role in providing the American people information and entertainment. The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely. The Committee is concerned that retransmissions of broadcast television service to home earth stations could violate the exclusive program contracts that have been purchased by local television stations. Depriving local stations of their program contracts could cause an erosion of audiences for such local stations because their programming would no longer be unique and distinctive.[19]

Thus, Congress was equally concerned with cultivating the emerging satellite industry and protecting the rights of networks, their affiliates, and local independent stations. The House Committee Report emphasized this balance, noting that "the bill respects the network/affiliate relationship and promotes localism. ... [The SHVA] provides carriers with an interim statutory license to cover [network and superstation] retransmissions, but establishes certain restrictions on the retransmission of network signals in order to prevent disruption of the networks' special exclusivity arrangements with their numerous affiliates."[20] Moreover, the House asked for cooperation among the satellite and broadcast industries in enforcement of the SHVA, on the grounds that:

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[18]H.R. Rep. No. 887(I) at 8.

[19]H.R. Rep. No. 887(II) at 26-27.

[20]H.R. Rep. No. 887(I) at 14-15.

> [s]uch cooperation ... will generally be pro-competitive, since it will help to preserve the exclusive distribution system -- through more than 600 local stations -- that has enabled a high percentage of all U.S. households to receive network programming through the existing network/affiliate system. The proposed legislation itself *complements* the existing distribution system, while also encouraging the use of a new technology to widen current viewing audiences.[21]

Thus, the network/affiliate relationship was not meant to take a back seat to Congressional efforts to foster the development of the then-nascent satellite industry.

As a result, Congress determined that it would be appropriate to apply syndex rules to the satellite industry, if feasible:

> Under the FCC's "syndex" rules, which will become effective in August 1989, cable television systems will be barred, under certain circumstances, from using the compulsory license to import the same programs for which local stations have already secured the exclusive exhibition rights in their service areas. According to the FCC, this action will correct the anomalous situation whereby cable television systems have been able to make the compulsory license take precedence over program licenses negotiated in the open market. The FCC decision was premised on a finding that it was never the intention of Congress, when creating the cable compulsory license, to allow the abrogation of broadcast stations' licenses. ... The statutory license created in this legislation allows carriers to deliver programming to home dish owners which may duplicate the programming under exclusive license to a local broadcaster serving many of those dish owners. The objective of [the SHVA]

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[21] Id. at 19-20 (emphasis added). The failure to cooperate and the "extensive evidence" of "substantial noncompliance" with the restrictions of the SHVA led to revisions of the SHVA in the Satellite Home Viewer Act of 1994 and, subsequently, to the lawsuits discussed in the NPRM. H.R. Rep. No. 703, 103rd Cong., 2d Sess. 6 (1994); NPRM at 5-6. Moreover, when Congress amended the SHVA in 1994, it strengthened the enforcement provisions, signifying its continued commitment to broadcast exclusivity. A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, Report of the Register of Copyrights, U.S. Copyright Office (Aug. 1, 1997) ("Copyright Report"), at 105.

> is to expand programming available to home dish owners; however, such expansion may appropriately be constrained by the application of "syndex" rules, if feasible in this market.[22]

Localism was of such concern to Congress that it determined that, despite satellite providers' small penetration of the video distribution industry relative to cable at that time, "[t]he mere fact that imposition of, or compliance with, syndicated exclusivity rules might be incrementally more costly for satellite carriers shall not be deemed to render such rules as not 'feasible' as that term is used in this section."[23] Thus, Congress clearly felt that, as with cable, grant of a compulsory license to facilitate the delivery of broadcast signals by satellite providers should not preclude the enforcement of broadcasters' exclusivity rights.[24]

### B. The Commission Has Also Acted to Preserve the Network/Affiliate Relationship and Local Stations' Exclusivity Rights

According to the NPRM:

> The network station compulsory licenses created by the Satellite Home Viewer Act are limited because Congress recognized the importance that the network-affiliate relationship plays in delivering free, over-the-air broadcasts to American families, and because of the value of localism in broadcasting.[25]

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[22]H.R. Rep. No. 887(I) at 28. Section 3 of the SHVA specifically directed the Commission to consider whether application of syndex rules to the satellite industry would be feasible. Although the FCC determined in 1991 that imposition of syndex rules on the satellite industry was not technologically or economically feasible, its reasons therefor were specifically tied to the immature nature of the satellite industry and the seemingly imminent expiration of the SHVA's compulsory license. Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Stations to Home Satellite Earth Station Receivers, Report and Order, 6 FCC Rcd 725 (1991) ("1991 Syndex Report and Order"). The Commission's decision is analyzed in more detail in Section III(C), *infra*.

[23]H.R. Rep. No. 887(II) at 27.

[24]The cable syndex rules were to serve as a model for the satellite syndex rules. Id. at 27.

[25]NPRM at ¶ 3 (footnotes omitted).

Likewise, the history of the Commission's syndex and non-dup rules reveals the Commission's intent to maintain the sanctity of the network/affiliate relationship, as well as a local television broadcast station's right to contract for exclusive programming.

1. The Commission Has Consistently Acted to Protect Local Broadcasters' Ability to Enter into Exclusive Programming Contracts

The Commission first granted non-dup and syndex-type protections to television broadcast stations in its first set of cable rules in 1965. These rules protected the rights of local television broadcast stations to be free of cable television duplication via distant signal carriage of both network and syndicated programming for 15 days before and after the local broadcast.[26] In adopting these rules, the Commission stated that its goal was

> to preserve to local stations the credit to which they are entitled -- in the eyes of the advertisers and the public -- for presenting programs for which they had bargained and paid in the competitive program market.[27]

In 1972, the Commission adopted further exclusivity rules designed to ensure that the exclusive rights in programming purchased by television broadcast stations would be respected.[28] In so doing, the Commission declared that "our basic objective is to get cable moving so that the public may receive its benefits, and to do so without jeopardizing the basic

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[26]Rules Re Microwaved-Served CATV, First Report and Order, Docket Nos. 14895 *et al.*, 38 FCC 683 (1965) ("1965 Order"). In 1966, the Commission expanded the rules, which in 1965 covered only microwave cable systems, to all cable systems, and required all cable systems to notify the Commission before carrying any distant signal. CATV, 2 FCC 2d 725, 803-04 (1966).

[27]1965 Order at 715.

[28]Cable Television Report and Order, Docket Nos. 18397 and 18397-A, 36 FCC 2d 142 (1972) ("1972 Order"). These rules were eliminated in 1980 and reinstated in 1988.

structure of over-the-air television."[29] Of course, central to such structure is the network/affiliate relationship. The Commission also stated that

> The additional program exclusivity rules are designed both to protect local broadcasters and to insure the continued supply of television programming. The latter, of course, is essential to the continued functioning of broadcast and cable television alike.[30]

These policy considerations are no less relevant today.

In reinstating syndex and non-dup protections for local television broadcast stations vis-a-vis cable systems in 1988, the Commission repeatedly cited the importance of a station's ability to contract for exclusive programming, thus fostering the network/affiliate relationship. For example, the Commission stated that

> Technological changes, primarily satellite distribution of signals, that permit easy movement of affiliates' signals across time zones now necessitate a change in the existing rule. . . . Because technological changes have seriously increased the potential for disruption, we have concluded that an increase in network programming exclusivity protection is necessary to allow network arrangements that provide important benefits to viewers to continue to function efficiently.[31]

Likewise, in its Notice of Proposed Rule Making that led to the 1988 syndex and non-dup rules, the Commission stated,

> The network non-duplication rules are analogous to the syndicated exclusivity rules because they allow a network affiliate to prevent a cable system from simultaneously importing another affiliate network program signal into its

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[29]Id. at ¶ 58 (emphasis added).

[30]Id. at ¶ 73.

[31]1988 Syndex Report and Order at ¶ 118 (footnotes omitted).

> market, thereby preserving the affiliate as the exclusive distributor of the network's programming.[32]

Thus, following Congress's directive, the Commission has protected local television broadcast stations' rights to contract for exclusive programming by granting syndex and non-dup protection. The need to uphold this policy in no way diminishes where such exclusivity would be abrogated by distant television broadcast signals imported by DBS instead of by a cable system.

2. The Commission's Syndex and Non-Dup Protections Do Not Depend on the Local Station's Viewability.

Because of the Commission's policy goals of preserving the network/affiliate relationship and local broadcasting, a television station does not lose its protection under the Commission's syndex and non-dup rules if it is not viewable by the cable subscribers in question. Instead, stations having entered into exclusive programming distribution contracts gain syndex or non-dup rights on cable systems within a certain distance of the station, regardless of the station's viewability in such communities.[33] Indeed, the local station requesting protection need not air the programming at the same time of day as the distant

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[32]Notice of Inquiry and Notice of Proposed Rulemaking, Docket No. 87-24, 2 FCC Rcd 2393 (1987) at ¶ 47 (footnote omitted).

[33]47 C.F.R. §§ 76.92(f)(Note), 76.151(Note), 73.658(m). Generally, such distances are 35 miles for syndex, 35 miles for non-dup in major television markets, and 55 miles for non-dup in smaller television markets. Of course, this demonstrates that the SHVA's compulsory license for "unserved areas" is not a substitute for syndex or non-dup rules. The need for syndex and non-dup protection becomes even more acute if the Commission proposes to expand the definition of "unserved area" to include even more homes.

station, or even be carried by the cable system,[34] in order to demand syndex and non-dup protection. Rather, the sanctity of the contractual relationship between the station and the program supplier is paramount.[35] As the Commission stated in its 1988 Syndex Report and Order,

> We have also determined that, similar to syndicated programming, the contractual relationship between a network and its affiliates, rather than the Commission's rules, is the appropriate determinant of the extent of non-duplication protection. Therefore, we shall not limit network non-duplication protection to any particular period of time, leaving it to the parties to determine a mutually agreeable arrangement.[36]

By the same token, whether the station in question provides a particular signal strength to a given household, or is even receivable at all by that household, is irrelevant, so long as the station and the programming supplier or network have contracted for the exclusivity throughout the geographic zone where such household is located.

The Commission clearly expressed the policy considerations behind this reliance on the sanctity of contract in its 1988 Syndex Report and Order:

> Our concern in this proceeding is that broadcasters and program suppliers be free to enter into effectively exclusive arrangements, because we have concluded that the effect of such arrangements is to increase the supply or

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[34] See 1988 Syndex Report and Order at ¶ 95 ("a station's right to exercise its syndicated exclusivity rights will not depend on its carriage by the cable system. If broadcasters obtain exclusive rights to important programming in their market, they will be in a position to make themselves more attractive to cable systems.")

[35] Id. at ¶ 122 (footnote omitted) ("We also affirm that the broadcaster need not be carried on a cable system in order to enforce network non-duplication protection for which it has negotiated. It is sufficient that the broadcaster holds non-duplication rights as an element of its affiliate contractual arrangements.")

[36] Id. at ¶ 118.

> quality of programming to viewers and to promote efficient arrangements for the delivery of network product.[37]

As these statements by the Commission demonstrate, the scope of protection granted under the syndex and non-dup rules are rooted in the existence and terms of the program contract (i.e., the affiliation agreement or syndication agreement), and are in place to protect the effectiveness of the contract. The extent of syndex or non-dup protection is not defined by the reach of the station's signal. Therefore, to the extent the Commission authorizes expanded importation of distant broadcast stations, the syndex and non-dup rules should apply to such distant signals transmitted to viewers in "unserved areas" under the SHVA to the same extent as they apply to distant signals imported by cable systems.

### C. Television Broadcast Stations Having Syndex and Non-Dup Rights as to Cable Operators Should Have the Same Rights as to DBS Providers

As discussed in the previous section, the syndex and non-dup rules promote localism and, more specifically, prevent infringement on exclusivity in broadcast station contracts. Because of the focus on and importance of localism and the local station contract, not on the means of delivery by which distant signals are imported, the Commission should protect stations' rights with respect to satellite providers just as it does with cable system operators. Although the FCC declined to do so seven years ago, the satellite industry has undergone almost a total transformation since then, and now DBS[38] providers are technologically and

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[37]Id. at ¶ 123.

[38]Unless stated otherwise, as used herein the abbreviation "DBS" refers to both the traditional Direct Broadcast Satellite service authorized by Part 100 of the FCC Rules and the Direct-to-Home Fixed Satellite Service ("DTH-FSS") operating under Part 25 of the Rules. See Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act

economically capable of complying with syndex and non-dup requirements. Broadcast stations, and especially affiliates of the emerging networks such as The WB, must be granted authority to enforce their syndex and non-dup rights against DBS providers in this increasingly competitive marketplace.

1. The Commission Should Not Protect DBS from Regulation at the Expense of Local Broadcast Stations

Although the Commission is concerned with the development of DBS, it must be equally concerned with the protection of localism and station rights, which are of great importance to Congress, the courts, and the Commission itself. As demonstrated in Section III(A), *supra*, Congress made clear when it promulgated the SHVA that station exclusivity rights are of great value and should be protected whenever feasible. The Supreme Court has validated Congress's position. Last year, it upheld the constitutionality of the cable must-carry provisions, and in doing so the Court affirmed the importance of preserving free, local broadcast television.[39]

In first considering the issue of the delivery of network programming over satellite, the Commission eloquently described the importance of the network/affiliate distribution system and its interplay with localism:

> This longstanding arrangement enhances the value to affiliates of network programming and provides affiliates with incentives to

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of 1992 (Direct Broadcast Satellite Public Interest Obligations), Report and Order, FCC 98-307 (Rel. Nov. 25, 1998) ("DBS Public Interest R&O"), at ¶¶ 4-10.

[39]Turner Broadcasting System, Inc. v. FCC, 117 S. Ct. 1174, 1186 (1997) (citing Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 662 (1994)); Id. at 1203-4 (Breyer, J. concurring).

> promote that programming locally. In the absence of an exclusive distribution system, these incentives are attenuated because other distributors that did not share the costs of promotion would nevertheless benefit from it. In turn, prosperous affiliates benefit the network by providing popular local programming. Such programming not only enhances the network's reputation, but, via delivery of large "lead-in" audiences for network programming, it increases network audiences and revenue.[40]
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> * * *
>
> Our analysis leads us to agree with the commentors that the efficiency of network-affiliate relationships should not be disrupted.[41]

As a consequence, a failure to adequately consider the importance of the broadcast programming distribution network in the instant proceeding would constitute an unwarranted departure from well-established precedent.

2. The Satellite Industry Has Changed Immensely in Recent Years, and It Is Now Capable, Technically and Economically, of Complying With Syndex and Non-Dup Rules

The provision of satellite programming services is a robust industry, much stronger than at the time of the passage of the SHVA, when Congress first anticipated the application of syndex rules to satellite providers. As of 1987, when the Commission issued its Report on the scrambling of satellite television signals, the use of the Ku band was in its earliest stages, and

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[40]Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, Report, 2 FCC Rcd 1669, 1691 (1987) ("Scrambling Report").

[41]Id. at 1697.

home satellite dish ("HSD") equipment was designed for use with C-band transmissions.[42] The Commission cited HBO's claim to being the first major cable program distributor to find value in the Ku band (commencing service in that band in 1986), and it noted that "no one but HBO indicated an interest in using the Ku band."[43] Moreover, even HBO was not using its Ku band capacity for consumer service, and the Direct Broadcast Satellite service, which had been authorized in 1982, was still undeveloped.[44]

When the Commission addressed the syndex issue in 1991 pursuant to the SHVA, the satellite industry had not changed much, and the Direct Broadcast Satellite service was only on the horizon.[45] The Commission did not consider DBS in arriving at its conclusion that syndex rules were not feasible for the satellite industry:

> Our decision herein addresses the existing satellite carriers that deliver the signals of superstations and network stations to subscribers using HSDs. ... [T]here are reports that new entities will begin offering additional satellite program service directly to homes. ... Although the temporary compulsory license is available to these enterprises, we have no information in the record upon which to base a conclusion on whether it would be technically or economically feasible for them to incorporate the technical means for complying with syndicated exclusivity requirements. In addition, whether any of the proposed systems will be successful in commencing full operations and obtaining sufficient subscribers before the compulsory license expires is

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[42] Id. at 1699-1700.

[43] Id.

[44] Id. at 1700. In this instance, and in the next sentence, the reference to "Direct Broadcast Satellite service" is meant to refer only to traditional DBS, not both DBS and DTH-FSS.

[45] 1991 Syndex Report and Order at ¶ 18.

> unknown. Therefore we do not address the feasibility of adopting exclusivity for these proposed systems....[46]

The crux of the Commission's decision was that the satellite services in place at the time would not have the technical capacity to implement syndex prior to the then-scheduled expiration of the compulsory license in 1994.[47] Specifically, it determined that because of the satellite systems' lack of deletion capacity, "[u]nder any reasonable scenario for introduction of ... new decoders, exclusivity protection would not reach a significant level until at least 1994, when the interim copyright license established by the SHVA expires."[48]

From an economic standpoint, the Commission reasoned that satellite providers would have a much more difficult time complying with syndex rules because of the need to develop a reliable deletion system, the difficulty in implementing such a system since equipment would need to be placed in customers' homes, and the limited number of HSD subscribers at the time, most of which were in rural or unserved areas where syndex would not apply.[49] It concluded that:

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[46]Id.

[47]Id. at ¶ 13 ("We conclude that implementing syndicated exclusivity for HSDs is not technically feasible before the end of 1994, when the interim compulsory copyright license for satellite carriers will expire."), ¶ 16 ("Several parties allude to the possibility that the compulsory license might be extended or made permanent.... We, however, must act upon the existing law as enacted by Congress.") (footnote omitted), ¶ 21 ("Because we already have concluded that syndicated exclusivity rules applied to satellite carriers are technically infeasible in the current environment, we need not reach the issue whether such rules would be feasible from an economic standpoint.").

[48]Id. at ¶ 15.

[49]Id. at ¶ 21.

> Based upon these considerations, particularly with respect to the minimal results that could be attained by 1994 when the compulsory license expires, we conclude that the cost of preventing viewing by a relatively few authorized HSD owners for a short period of time is more than incrementally greater than the cost of cable syndicated exclusivity and consequently, that promulgating rules for satellite carriers similar to those for cable is economically infeasible.[50]

Clearly, by now, the economics and technical capacity of satellite systems have changed dramatically.

In enacting the Satellite Home Viewer Act of 1994, Congress specifically found that "there has been a phenomenal growth in the number of satellite subscribers since 1988. The two principal satellite carriers retransmitting network stations, Prime Time 24 and Netlink, have enjoyed increases of 1,338% and 550%, respectively."[51] Since then, the satellite industry has climbed to even greater heights, as subscriber gains in 1998 by far outpaced previous years, with estimates touting a 40% increase over 1997, despite cable operators' shifts to digital systems.[52] Moreover, the industry is adding subscribers at a rate of more than 5,000 per day,[53] and the numbers are expected to continue their rapid ascent.[54] In fact, if DBS providers were compared with the top cable multi-system operators in terms of subscribership,

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[50]Id.

[51]H.R. Rep. No. 703 at 10-11.

[52]"DBS Gains Put the Industry on Track for a Record Sales Year," Satellite News (Nov. 23, 1998).

[53]"Direct-to-Home Satellite Television Subscribership Surges," Communications Today (Jul. 27, 1998).

[54]DBS Public Interest R&O, *supra*, at ¶ 4.

DirecTV would surpass Cox Communications as sixth largest, and Primestar would rank eighth.[55]

The growth of DBS has depended in part on technological advances which allow it to provide better services than before. DBS providers are not only capable of offering premium and pay-per-view services, which require addressable technology capable of providing service on a home-by-home basis, but they have been extremely successful in that respect.[56] In addition, Echostar, a leading DBS provider, is striving to provide interactive services, which also would require targeting service to individual homes.[57] Contrast this with the fact that, not only was satellite pay-per-view nonexistent when the Commission last considered applying syndex to satellite providers, in that rulemaking the satellite interests argued that compliance with syndex requirements would be impractical "because of the imprecision inherent in a system that relies upon the location of the main post office within each three-digit postal zip code to define the geographic deletion areas."[58] Now, via this new technology, DBS providers have the ability to delete overlapping distant broadcast retransmissions through the use of digital transmissions and addressable technology.[59] There is simply no rational reason not to apply the syndex and non-dup rules to DBS service providers who voluntarily elect to import

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[55]"DBS, Cable's Ambitious Competitor," Broadcasting and Cable (Apr. 20, 1998), at 46.

[56]"DBS Winning Fight for Pay Viewers," Broadcasting and Cable (May 11, 1998), at 61.

[57]"Echostar Going for High Speed," Broadcasting and Cable (Oct. 19, 1998), at 89.

[58]1991 Syndex Report and Order, *supra*, at ¶ 12.

[59]Of course, the Commission might reasonably limit any syndex and non-dup obligations to DBS providers employing such sophisticated technology, such as DirecTV, Primestar and Echostar, while exempting C-Band satellite distributors relying on analog boxes.

distant television broadcast stations, principally major network affiliates from New York City or Los Angeles, to compete with local stations in smaller markets.

Moreover, syndex and non-dup regulations require nothing more of DBS providers than the use of technology already in place and, unlike such issues as must-carry and PEG access, syndex and non-dup do not raise issues of channel capacity. Accordingly, implementing those rules would do nothing to contravene the Commission's stated goal "to create flexible, practical rules that will achieve statutory objectives without stifling growth in the DBS industry so that it can realize its competitive potential." [60]

### 3. In an Increasingly Competitive Video Programming Marketplace, Syndex and Non-Dup are Crucial to Broadcast Stations, Especially Affiliates of an Emerging Network Such As The WB

In contrast to DBS's great strides, protection of the contractual rights of local broadcast stations is crucial in light of current trends in the marketplace. Competition and programming diversity in the video industry have eviscerated the once-dominant position of the major broadcast networks. Since the 1978-79 television season, the combined audience share of

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[60]DBS Public Interest R&O, *supra*, at ¶ 2. Moreover, that DBS still is not on equal footing with cable does not justify refraining from implementing syndex and non-dup rules. The Commission recognized this principle in the promulgation of rules for open video systems ("OVS"). Implementation of Section 302 of the Telecommunications Act of 1996, Second Report and Order, 11 FCC Rcd 18223, recon. granted in part and denied in part, 11 FCC Rcd 20227 (1996). The Commission had been directed by Congress to apply its syndex, non-dup, and sports exclusivity rules to OVS. Id. at ¶ 199. Despite the agency's and Congress' desire to develop the new service as a competitor to cable (id. at ¶¶ 2-3), the Commission determined that it "[did] not believe that open video systems that span multiple geographic zones or communities should be treated any differently than similar cable systems." Id. at ¶ 201. This also raises the issue of regulatory parity -- treating DBS operators similar to their cable competitors -- which is another important reason to adopt these requirements for DBS providers.

ABC, NBC and CBS has been cut almost in half, dropping from 91% to 47%.[61] Since the enactment of the SHVA in 1988, they have lost almost one-third of their prime time audience share.[62] This decline has directly affected network advertising rates, and this season the networks' asking prices for advertising spots have stayed flat or dropped for a significant number of shows.[63] This situation can only be exacerbated by the importation of distant signals by satellite providers. Since at this time DBS service generally does not provide viewers with their local television broadcast stations, as does cable, the lack of syndex and non-dup protection in the satellite context is all the more dangerous to broadcasters because viewers may watch distant signals on satellite to the exclusion of local stations in their entirety.[64]

In The WB's case especially, network affiliates deserve proper contractual protection in order to maintain their competitive strength and, as a result, the network's own growth as a video program provider. The development and growth of new broadcast networks provide a diverse source of programming and benefit the public interest.[65] Emerging networks such as

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[61]"Can the Big 4 Still Make the Big Bucks?", Broadcasting and Cable (June 8, 1998), at 24-25.

[62]Id.

[63]Id.; "Prime Prices Fall With Shares," Broadcasting and Cable (Sept. 28, 1998), at 36.

[64]Copyright Report, *supra*, at 119.

[65]The WB takes great pride in its commitment to providing innovative and award-winning children's programming and in developing a prime-time lineup appealing to a younger-skewing audience while maintaining family-wide appeal. Moreover, The WB has also provided alternative and minority producers, writers and actors with a unique outlet for their creative material, unfettered by many of the constraints encountered when dealing with one of the established networks.

The WB offer a solid programming, marketing and financial base to affiliates, which tend to be formerly marginal independent UHF stations. Network support gives those stations the potential for success in an increasingly precarious broadcast environment. As the Commission previously has held:

> When there is a diverse set of program sources and outlets, as there increasingly is in the current television marketplace, the net effect of allowing exclusive arrangements is to increase the kinds of competition and program diversity that can serve the interest of viewers. For example, the emergence of Fox television as a programming service that can compete effectively with the 3 networks depends upon the expectation that cable operators will not destroy Fox affiliates' programming exclusivity by carrying imported Fox programming distributed by a satellite carrier. A broadcaster will find it profitable to sign an exclusive contract only for programs that he will be able to promote effectively, and the broadcaster best able to attract viewers will be in a position to pay the most for that exclusivity. Competition among program suppliers ensures that exclusive contracts will be sought only for programs that will benefit from the extra promotion exclusivity allows. Naturally, many of these will be programs with substantial mass appeal, but some may also be programs that would not be produced or broadcast at all without the protection afforded by exclusivity. As long as there is reasonable competition among suppliers and distributors, exclusivity is a competitive tool that fosters the efficient channeling of programming to its most appropriate outlets, thereby maximizing the extent and diversity of programming available to viewers.[66]

Here, permitting the exercise of exclusivity rights by broadcast stations would further the development of emerging networks such as The WB without hindering DBS's growth, thereby advancing the Commission's goal of fostering a competitive video programming environment.

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[66] 1988 Syndex Report and Order, *supra*, at ¶ 64 (footnotes omitted).

## IV. CONCLUSION

For the reasons set forth above, The WB believes that the Commission has no jurisdiction to alter the statutory viewability standard for local television broadcast stations for purposes of the SHVA. However, should the Commission decided to adopt a new standard, The WB urges the Commission, regardless of the standard it may adopt, to grant syndex and non-dup protection to local television broadcast stations from satellite retransmission of distant television broadcast signals. Otherwise, the policies that Congress and the Commission have long sought to further -- the network/affiliate relationship, the ability of local television

broadcast stations to contract for exclusive programming, and local broadcasting itself -- will be severely undermined.

Respectfully submitted,

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Date: December 11, 1998